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Supreme Court, U.S.
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No. 01-1078

In The

Supreme Court of the United States

BEVERLY BURDEN, CHAPTER 13 TRUSTEE FOR THE ESTATES OF LUTHER GILBERT, JR., VICTORIA TEVIS, SANTINA TURNER, AND FRANK LEWIS BRADSHAW; AND FRANCINE JACKMAN, ELAINE STEWARD GREENE, LUTHER GILBERT, JR., VICTORIA TEVIS, SANTINA TURNER AND FRANK LEWIS BRADSHAW, INDIVIDUALLY,

Petitioners,

v.

CHECK INTO CASH OF KENTUCKY, LLC, W. ALLAN JONES, JR., ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether under the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16 (1997), a party to a contract can avoid an otherwise valid agreement to arbitrate a dispute by alleging that a state statute voids the entire contract containing the arbitration clause. The Sixth Circuit Court of Appeals correctly determined below that, pursuant to *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), such an allegation was insufficient to avoid arbitration because it was not directed at the arbitration clause itself, and because Petitioners did not claim that they lacked signatory authority to enter into the contracts in question.

LIST OF PARTIES AND RULE 29.6 STATEMENT

The parties to the proceedings below were Francine Jackman, Elaine Steward Greene, Luther Gilbert, Jr., Victoria Tevis, Santina Turner, Frank Lewis Bradshaw, and Beverly Burden, Chapter 13 trustee for the estates of Luther Gilbert, Jr., Victoria Tevis, Santina Turner and Frank Lewis Bradshaw, Check Into Cash of Kentucky, LLC, W. Allan Jones, Jr., and the Department of Financial Institutions of the Commonwealth of Kentucky.

Of the group of original Plaintiffs and other parties, only Francine Jackman has standing as a Petitioner here because she is the only person who is a party to an arbitration agreement who has properly submitted a petition for writ of certiorari.

Check Into Cash of Kentucky, LLC, has no parent and no publicly held corporation owns 10% or more of the corporation's stock.

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BRIEF IN OPPOSITION

Respondents, Check Into Cash of Kentucky, LLC ("Check Into Cash") and W. Allan Jones, Jr. ("Jones"), submit this brief in opposition to the petition for writ of certiorari.

STATEMENT OF THE CASE

Check Into Cash was engaged in the business of deferred-deposit check cashing in the Commonwealth of Kentucky. It was licensed by the Commonwealth of Kentucky's Department of Financial Institutions ("DFI") under Chapter 368 of the Kentucky Revised Statutes to conduct such business. To qualify for a license, Check Into Cash had to satisfy the Commissioner of the DFI that it had a "net worth of at least One Hundred Thousand Dollars ($100,000) [and that its] financial responsibility, financial condition, business experience, character, and general fitness . . . reasonably warrant[ed] the belief that [its] business [would] be conducted honestly, carefully and efficiently." Ky. Rev. Stat. Ann. § 368.040 (Banks-Baldwin 1993) (amended Apr. 14, 1998).

The DFI had authority pursuant to Ky. Rev. Stat. Ann. § 368.070(1) (Banks-Baldwin 1993) to investigate Check Into Cash to confirm that it met the requirements of Ky. Rev. Stat. Ann. § 368.040 prior to issuing a license. Moreover, the Commissioner had the authority to revoke a check cashing license for any fraud, dishonest activity, or misrepresentation. *See* Ky. Rev. Stat. Ann. § 368.110(1) (Banks-Baldwin 1993). Check Into Cash never had its license revoked and at all times operated in compliance

with Ky. Rev. Stat. Ann. §§ 368.010-.990 (Banks-Baldwin 1993) (amended Apr. 14, 1998). Those statutes authorized Check Into Cash to charge a fee.

As part of the check transactions between Check Into Cash and the Plaintiffs, the customer completed an application process, which included a detailed questionnaire. The customer had to produce valid identification and other information. Also, each customer signed a written agreement which governed the specific transaction, clearly delineating the terms and conditions of the transaction.

Only two of the Plaintiffs in this case, Victoria Tevis[1] and Francine Jackman, signed check cashing agreements containing arbitration clauses, conspicuously requiring that all disputes arising under the agreement or in connection with the check cashing transaction be submitted to arbitration. Specifically, the clause states:

> **ARBITRATION**: To pursue any claim, demand, dispute or cause of action (a "claim") arising under this Agreement or the transaction in connection with which this Agreement has been executed, the claimant must submit to the other party in writing an explanation of the claim and a demand that the claim be resolved

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[1] Victoria Tevis was originally in a Chapter 13 bankruptcy proceeding and the Chapter 13 trustee, Beverly Burden, pursued this case on behalf of her estate. Ms. Tevis' Chapter 13 proceedings were converted to a Chapter 7 bankruptcy. The trustee of Ms. Tevis' Chapter 7 proceeding has not sought to become a party to this case and did not file a petition for writ of certiorari. Therefore, neither Ms. Burden nor Ms. Tevis are a proper party-petitioner here.

> by arbitration. If the other party does not respond to the submittal in writing within ten (10) days of its receipt, the claimant may pursue the claim either through arbitration or court action. If the other party responds to the submittal in writing within ten (10) days of its receipt, the claim must be submitted to binding arbitration in accordance with and pursuant to the Uniform Arbitration Act as enacted in the Commonwealth of Kentucky, KRS 417.045, et seq., as amended from time to time (the "Act"). The arbitration shall be conducted by one or more arbitrators selected by agreement between you and Check Into Cash but, if no agreement on the arbitrator[s] can be reached, by the Kentucky District Court for claims involving $4000 or less or the Kentucky Circuit Court, in either case, in the county where this Agreement was signed. The expenses of the arbitration, including attorney's fees, will be paid in accordance with the award issued by the arbitrator[s]. The finality and binding effect of the arbitration award shall be as set forth in the Act.

Plaintiffs filed this action on April 20, 1998, purportedly for themselves and for others similarly situated, alleging they had conducted business with Check Into Cash, and that Check Into Cash and Jones committed fraud and violated several state and federal statutes. In their Second Amended Complaint filed July 6, 1998, Plaintiffs asserted causes of action against Defendants based on violations of the Kentucky Disclosure of Finance Charges on Installment Credit Transaction Act, Ky. Rev. Stat. Ann. § 360.210, *et seq.* (Banks-Baldwin 2000), the Kentucky Usury Statute, Ky. Rev. Stat. Ann. § 360.010, *et seq.* (Banks-Baldwin 2000), the Kentucky Consumer Loan

Act, Ky. Rev. Stat. Ann. § 288.410, *et seq.* (Banks-Baldwin 2000), the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601, *et seq.* (1993), 12 C.F.R. Part 226 (1999) (Regulation Z), the Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq.* (1991) ("RICO"), and the Kentucky Consumer Protection Act, Ky. Rev. Stat. Ann. § 367.110, *et seq.* (Banks-Baldwin 2000). Plaintiffs filed the underlying action on their own behalf, and purportedly as class representatives in a class action where "each class member was harmed in the same way, having been falsely solicited and induced to borrow money and pay usurious and exorbitant interest rates." No class has been certified.

The case was initially held in abeyance while the Supreme Court of Kentucky considered a certified question of law from the United States District Court in a case where a similar state usury allegation was made. Following the Kentucky Supreme Court's decision in that matter, *White v. Check Holders, Inc.*, 996 S.W.2d 496 (Ky. 1999), and the subsequent lifting of the stay in this action, the Respondents filed a Motion to Compel Arbitration and Stay Litigation Pending Arbitration on January 6, 2000, directed to the Plaintiffs who had executed agreements containing commitments to arbitrate the relevant dispute.[2]

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[2] The motion was directed at Victoria Tevis, Luther Gilbert, Francine Jackman, and Beverly Burden, who was then Gilbert's and Tevis' Chapter 13 bankruptcy trustee. Subsequent to the Sixth Circuit appeal in this matter it was determined (and Respondents concede) that Luther Gilbert did not sign a contract containing an arbitration agreement. Therefore, only two Plaintiffs, Victoria Tevis and Francine Jackman, signed

Petitioners resisted arbitration on numerous grounds. First, they claimed that the arbitration clause was unenforceable as unconscionable and part of a contract of adhesion. Second, they claimed that the arbitration clause prevented consumers from vindicating their statutory rights. Third, they alleged that the public policy favoring arbitration was unjustifiable in this context. Fourth, they asserted that the arbitration clause was unenforceable because the underlying agreement was void. On May 12, 2000, the district court issued its Opinion and Order, denying the motion. The district court solely accepted Petitioners' fourth argument in denying the Motion to Compel Arbitration, and did not reach the other grounds asserted by Petitioners for avoiding the arbitration clause.

Pursuant to section 16 of the FAA, 9 U.S.C. § 16 (1997), Respondents appealed the district court's order denying arbitration to the Sixth Circuit Court of Appeals. After briefing and argument the Sixth Circuit rendered its unanimous decision on October 1, 2001, vacating the district court's decision and remanding the case for further proceedings to consider Petitioners' arguments that the arbitration agreements were unenforceable because they would deny statutory rights, would constitute an uninformed jury trial waiver and would impose burdensome costs.

In its decision the Sixth Circuit, following *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), held

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arbitration agreements. Furthermore, only Ms. Jackman is a proper party-petitioner. *See supra* note 1 and *infra* section V.

that the district court erred in holding that Petitioners' challenges to the validity of the check cashing agreements at issue must first be decided by the court rather than an arbitrator pursuant to the arbitration clause. Because Petitioners' allegations failed to challenge the validity of the arbitration clause itself and challenged the "substance, rather than the existence" of the agreements, the Sixth Circuit vacated the district court's order denying arbitration. However, because the district court did not consider Petitioners' other challenges to the making of the arbitration agreements, separate from the check cashing agreement, the Sixth Circuit remanded the case to the district court for further consideration of those issues.

REASONS WHY THE PETITION SHOULD BE DENIED

I. The Sixth Circuit's Decision Correctly Applied the FAA to this Case and Is Consistent with *Prima Paint* and this Court's Arbitration Precedent.

This Court has long recognized the "strong national policy favoring the enforcement of arbitration agreements." *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 224 (1987). Indeed, as a matter of federal law, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24-25 (1983). Notwithstanding this clear authority promoting the use and effectiveness of arbitration to resolve disputes, litigants have continued to advance arguments seeking to avoid arbitration and attempting to require

federal courts to decide threshold and merits issues in disputes where arbitration clauses are present. Petitioners' claim in this case is yet just another assault on the efficacy of FAA and the strong federal policy promoting arbitration. If Petitioners' argument is accepted, it would create a convenient end-run around the FAA for litigants who seek to avoid agreements to arbitrate.

In *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), this Court outlined the limited role that courts play in disputes about the application of arbitration clauses. In that case, plaintiff brought suit in federal court for rescission of a consulting agreement on the basis that the agreement was procured by fraud. The consulting agreement contained a clause requiring any claim or controversy be resolved through arbitration. *See id.* at 398. The plaintiff argued that a fraudulent inducement claim, which would void the entire contract, must be decided first by the court rather than by an arbitrator. Otherwise, "[i]f the contract was procured by fraud . . . there is absolutely no contract, nothing to be arbitrated." *Id.* at 412 (Black, J., dissenting).

This Court rejected that argument, finding that the FAA explicitly limited a federal court's involvement in arbitrability disputes to claims that challenged the validity of the agreement to arbitrate itself.

> Under [FAA] § 4, . . . the federal court is instructed to order arbitration to proceed once it is satisfied that "the making of the agreement for arbitration or the failure to comply (with the arbitration agreement) is not in issue." Accordingly, if the claim is fraud in the inducement of the arbitration clause itself – an issue which

> goes to the "making" of the agreement to arbitrate – the federal court may proceed to adjudicate it. But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally. . . . In so concluding, we not only honor the plain meaning of the statute but also the unmistakeably clear congressional purpose that the arbitration procedure, when selected by the parties to the contract, be speedy and not subject to delay and obstruction in the courts.

Id. at 403-04. In this case, nowhere did Petitioners allege that the arbitration agreements themselves – separate from the check cashing agreements generally – were procured by fraud or were otherwise void or voidable. Therefore, the Sixth Circuit correctly found that the holding of *Prima Paint* was fully applicable to the present case. *See* Pet. App. at 13-14.

The Sixth Circuit also correctly rejected Petitioners' request that an exception to the *Prima Paint* holding be created for cases where one party alleges that a contract as a whole violates some statutory provision. Petitioners asserted in this case a number of facial challenges to the enforceability of the check cashing contracts at issue. By seeking to have the district court determine whether the contract was "void" under Ky. Rev. Stat. Ann. § 288.991 (Banks-Baldwin 2000), Petitioners essentially sought to have the district court decide the merits of their claims under the guise of deciding whether the disputes are arbitrable. Endorsing such a procedure as an exception to *Prima Paint* would create an untenable loophole in this Court's long-held federal arbitration policy. It would encourage other litigants to raise similar allegations

(regardless of their merit) in an attempt to avoid consented-to arbitration agreements.

Indeed, the Petitioners' position is at odds with one of the fundamental arbitration principles espoused by this Court – "in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is ***not to rule on the merits of the underlying claims.***" *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 649 (1986) (emphasis added).[3] Otherwise, the benefits to the parties of the arbitration procedure and the agreement to arbitrate itself are undermined by the overly broad scope of the court's threshold arbitrability decision. A determination that a contract is illegal and unenforceable made in the context of an arbitrability dispute short circuits the ability of an arbitrator to decide the merits of the underlying claim.

Therefore, the Sixth Circuit's unanimous decision properly applied the FAA and *Prima Paint* to the unique facts of this case. Because the Sixth Circuit's opinion was correctly decided and is consistent with this Court's prior FAA precedents, this Court should deny Petitioners' petition for writ of certiorari.

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[3] While *AT&T Technologies* arose in the context of an arbitration clause in a collective bargaining agreement, the principles announced therein have equal force and application to nonlabor arbitration agreements. *See Cincinnati Gas & Electric Co. v. Benjamin F. Shaw Co.*, 706 F.2d 155, 160 (6th Cir. 1983) (district judge's arbitrability inquiry in commercial arbitration dispute must avoid determining merits of dispute); *PaineWebber, Inc. v. Elahi*, 87 F.3d 589, 594 n.6 (1st Cir. 1996).

II. The Sixth Circuit's Decision Does Not Elevate Arbitration Clauses Above Other Contractual Provisions.

Petitioners also argue that the Sixth Circuit's decision somehow does violence to the purposes of the FAA by requiring that an arbitrator rather than the court decide whether the contract as a whole is void and unenforceable. Petitioners complain that it is improper to "single out" an arbitration clause and give it effect when one party alleges that the entire contract is void and unenforceable. Petitioners are attempting to argue *sub silentio* that *Prima Paint* itself was incorrectly decided and that 35 years of federal jurisprudence following *Prima Paint* should be overruled. This Court has never questioned the viability of the *Prima Paint* rule and should decline Petitioners' implicit invitation to revisit it in this case by granting a writ of certiorari.

The rationale of *Prima Paint* is that the FAA requires a specific inquiry only into the "making and performance of the agreement to arbitrate" itself in deciding whether to compel arbitration, rather than a broader inquiry into the enforceability of the entire contract. *Prima Paint*, 388 U.S. at 404. *Prima Paint* therefore requires an analysis of the enforceability of the arbitration clause that is separate and distinct from the enforceability or validity of the contract that contains the arbitration clause. This Court determined that such a result is required not only by the language of the statute but also because of the clear purpose of the FAA that arbitration "be speedy and not subject to delay and obstruction by the courts." *Id.*

Therefore it is the FAA that limits the federal district court to a narrow arbitrability review that separates or "singles out" the enforceability of the arbitration clause from the contract as a whole. The Sixth Circuit's decision does nothing more and is perfectly consistent with *Prima Paint*. It is undisputed that Petitioners never challenged the arbitration clause itself as void or put its "making" at issue other than through the arguments that the Sixth Circuit has now remanded for eventual determination by the district court. It is also undisputed that Petitioners have never alleged that they did not intend to enter into the contracts at issue or that they lacked signatory power. Instead, Petitioners' challenge under Ky. Rev. Stat. Ann. § 288.991 is to the substance and the enforceability of the entire agreement, which is no different than their other statutory claims, and no different than the claim of fraudulent inducement in *Prima Paint*. Therefore, the Sixth Circuit did not improperly "elevate" the arbitration clause in this case in a manner contrary to the FAA or *Prima Paint*.

III. There Is No Split of Authority About Whether the Court Must Decide, Pursuant to the FAA, an Allegation that a Statutory Provision Makes a Contract Void.

A. The Federal Courts of Appeals Are Not in Conflict.

Petitioners claim that the Sixth Circuit's decision in this case is in direct conflict with decisions of the Third, Seventh and Ninth Circuits as a basis for seeking certiorari review. However, no such conflict exists. No other federal court of appeals has held that a facial claim that a

contract is void under a state statute defeats the arbitration provisions of that contract. Indeed, the Third, Seventh and Ninth Circuit cases cited by Petitioners are all factually and legally distinguishable from the current case. Accordingly, Petitioners' claimed conflict is illusory and provides no basis for this Court to grant certiorari.

Under the FAA, the threshold inquiry in deciding whether to compel enforcement of an arbitration agreement is the determination of whether the parties have agreed to arbitrate the claims at issue. *See* 9 U.S.C. § 4 (1997) (district court must compel arbitration "upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue"). *Accord Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985). In other words, because arbitration is a matter of contract, "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers of America v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960); *see also Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995). As this Court has often explained, that initial inquiry is one for the court and not the arbitrators. *AT&T Technologies v. Communications Workers of America*, 475 U.S. 643 (1986). *Accord Mitsubishi Motors*, 473 U.S. at 626.

The federal court of appeals cases relied upon by Petitioners apply these core principles to determine whether there has been a true "meeting of the minds" and therefore an agreement between the parties to arbitrate disputes under an agreement. Many of these cases deal with whether a party indeed signed an arbitration agreement. *See, e.g., Chastain v. Robinson-Humphrey Co.,*

Inc., 957 F.2d 851 (11th Cir. 1992) (whether party's signature was forged). The rest deal with whether the individual who did sign the agreement had authority to sign the agreement or bind the party represented. *See, e.g., I.S. Joseph Co., Inc. v. Michigan Sugar Co.*, 803 F.2d 396 (8th Cir. 1986) (whether assignor's agreement binds assignee as well); *Sphere Drake Ins. Ltd v. All American Ins. Co.*, 256 F.3d 587 (7th Cir. 2001) (authority of agent to sign); *Three Valleys Mun. Water Dist. v. E.F. Hutton & Co., Inc.*, 925 F.2d 1136 (9th Cir. 1991) (authority of signatory to sign); *Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99, 107 (3d Cir. 2000) (authority of signatory to sign).

These cases are unremarkable applications of sections 3 and 4 of the FAA to determine whether one party to the contract has in fact agreed to submit disputes to arbitration. All these cases address the threshold question of whether, due to lack of signatory power or authority, there was indeed a meeting of the minds to arbitrate. This Court addressed similar issues in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), wherein it determined that parties who had signed three contracts containing no arbitration clauses were not bound to arbitrate their claims even though a related contract they had not signed contained an arbitration clause.

However in this case, Petitioners raised no issue or question about their capacity or authority to sign the agreements at issue. No claim was made that Petitioners' signatures were forged or inauthentic. No claim was made that others had signed the Petitioners' names to the documents without approval. No claim was even made that the agreements had been signed by Petitioners' representatives or agents rather than themselves personally.

Therefore, the cases asserted by Petitioners as being in conflict with the Sixth Circuit's decision below are distinguishable from and have no application to the instant case. Petitioners have cited to no federal court of appeals decision holding that a court must determine whether a contract as a whole is "void" under state statutory law before enforcing an agreed arbitration clause in that contract. Therefore, there is no conflict with the Sixth Circuit's decision in this case.

To be sure, in *dicta* analyzing prior cases from other circuits, the court of appeals below expressed its concern that the reasoning of those other circuits "appears to be in tension" with prior Sixth Circuit cases. *See* Pet. App. at 8. Nevertheless, the Sixth Circuit found it unnecessary to "reach the question" Petitioners broadly seek to present to the Court in this case. *Id.* at 9. Instead the court reconciled prior Sixth Circuit authority with cases from other Circuits in resolving the particular arbitrability dispute at issue here. *See id.* at 9-10. Therefore, the Sixth Circuit's decision not only is distinguishable from the cases relied on by Petitioners, but the opinion also went to great pains to harmonize and reconcile cases from the other circuits in order to avoid any possible "conflict" or further "tension" between or among the decision in this case and those prior cases. The court of appeals properly distinguished the cases cited by Petitioners as cases addressing questions of signatory power or authority rather than the issue of contract content raised here. *See id.* at 10. Therefore, even if Petitioners might anticipate possible future conflicts among circuits in a different factual or procedural situation, no such conflict is presented by the decision in this particular case.

Indeed, the other courts of appeals would likely decide this same case the same way as the Sixth Circuit if it were presented to them. The Ninth Circuit has noted that the *Three Valleys* case is limited to its unique facts and that, under *Prima Paint*, "[a]n arbitration clause may thus be enforced even though the rest of the contract is later held invalid by the arbitrator." *Republic of Nicaragua v. Standard Fruit Co.*, 937 F.2d 469, 476 (9th Cir. 1991), *cert. denied*, 503 U.S. 919 (1992). The Seventh Circuit has also ordered arbitration in a class action case that challenged the legality under the Commodity Exchange Act of the entire contract containing an arbitration clause. *See Harter v. Iowa Grain Co.*, 220 F.3d 544, 550 (7th Cir. 2000) ("[Harter] attacks the legality of the contract as a whole. Thus, under the Federal Arbitration Act and cases construing it, the dispute arising from the contracts – namely, the legality of the contracts under the CEA – is arbitrable."). The Seventh Circuit has also required arbitration in other cases where one party attempted to nullify a contract or challenge it as "illegal." *See Sweet Dreams Unlimited, Inc. v. Dial-A-Mattress Int'l, Ltd.*, 1 F.3d 639, 641 (7th Cir. 1993) (dispute "which has as its object the nullification of a contract" must be arbitrated); *Sokaogon Gaming Enterprise Corp. v. Tushie-Montgomery Assocs., Inc.*, 86 F.3d 656, 659 (7th Cir. 1996) ("Although the arbitration clause is contained in a contract that the tribe contends is illegal, the tribe rightly does not argue that the illegality of the contract infects the arbitration clause.").

Accordingly, the Sixth Circuit's decision below is not in conflict with any other federal court of appeals decision. The cases that Petitioners purport to be in conflict are all distinguishable; they each deal with issues of

signatory authority and the "making" of the arbitration agreement itself that are undeniably not issues in this case. Therefore, there is no conflict with a decision of another court of appeals on an important matter that would support the granting of the petition for writ of certiorari.

B. There Is No Split Between State and Federal Cases under the FAA.

As an alternative argument to support their petition for writ of certiorari, Petitioners claim that the Sixth Circuit "failed to address" state court decisions that allegedly conflict with the Sixth Circuit's position in this case. At the outset, Petitioners' arguments based on opinions decided by two Florida intermediate appellate courts, *Party Yards, Inc. v. Templeton*, 751 So. 2d 121 (Fla. Dist. Ct. App. 2000) and *Fastfunding The Company, Inc. v. Betts*, 758 So. 2d 1143 (Fla. Dist. Ct. App. 2000), are unavailing to obtain a writ of certiorari in this Court and should be ignored. *See* Sup. Ct. R. 10.

Petitioners largely rely on the recent case of *Alabama Catalog Sales v. Harris*, 794 So. 2d 312 (Ala. 2000), wherein the Alabama Supreme Court determined that a trial court was correct to deny arbitration under a "payday loan" contract alleged to be illegal under Alabama's Small Loan Act. Again, that case is distinguishable from the present case, and a careful analysis reveals that its uniqueness does not justify the conclusion that it is in conflict with the Sixth Circuit.[4] Although the contract in that case

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[4] The transaction at issue in that case involved payday loans connected to gift certificates and merchandise credit not at

referenced the Federal Arbitration Act and the court referenced several federal decisions under the FAA, including *Prima Paint*, it is unclear whether the Alabama court's opinion was based on the FAA or on state law principles. Indeed, the Alabama court's opinion was based primarily on two prior Alabama arbitration opinions that did not expressly apply or interpret the FAA. *See Shearson Lehman Bros., Inc. v. Crisp*, 646 So. 2d 613 (Ala. 1994); *Camaro Trading Co. v. Nissei Sangyo America, Ltd.*, 577 So. 2d 1274 (Ala. 1991).

Alabama has by statute proclaimed a public policy against arbitration. Ala. Code § 8-1-41(3) (1975) (court shall not enforce agreement to submit dispute to arbitration). This Court has already declared that statute unenforceable and in conflict with the FAA in another context. *See Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995). Therefore, the Alabama court's opinion in *Alabama Catalog* most likely reflects that state's unique hostility to arbitration generally under its own state law,[5] and does not present an apparent conflict certain to arise in other states that apply the FAA. Moreover, any concerns this Court may have about Alabama's perception of the supremacy of the FAA should be addressed in the context of a case arising from that jurisdiction rather than issuing

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issue here. In addition, the Alabama court made a specific finding that there was "substantial evidence of illegality." *Id.* at 316.

[5] Indeed, the Alabama Supreme Court recently went so far as to decide that a similar payday loan contract to the one at issue in *Alabama Catalog* did not affect interstate commerce in order to avoid the dictates of the FAA. *See Alternative Financial Solutions, LLC v. Colburn*, 2001 WL 1451106 (Ala. 2001).

a writ of certiorari to the Sixth Circuit in this matter. *See id.*

Nevertheless, even if there is a perceived conflict between the decision below and *Alabama Catalog Sales*, it does not warrant the exercise of certiorari jurisdiction. It is not apparent that the precise issue here will occur with any frequency in future cases. In addition, the Sixth Circuit opinion actually harmonizes the rationales of prior opinions and provides a new perspective for determining arbitrability issues that should be left to further consideration by other lower courts in the future. Therefore, the exercise of certiorari jurisdiction is unwarranted and unnecessary in this situation.

IV. Certiorari Should Be Denied Because this Case Implicates Substantive Questions of Kentucky State Law.

Considerations involving the lack of factual and legal development about the underlying dispute, and the potential that this Court will need to interpret and apply unresolved questions of state law to decide the issue presented, militate against certiorari review in this case. First, Petitioners base their certiorari arguments on the notion that Ky. Rev. Stat. Ann. § 288.991 makes the agreements at issue "void ab initio." Yet, no Kentucky court or administrative tribunal has ever so held in connection with the agreements at issue in this case. Furthermore, no reported case has ever interpreted or applied Ky. Rev. Stat. Ann. § 288.991 to determine whether contracts made in violation of that section are "void ab initio" or instead "voidable." Finally, there are no reported decisions in

which a court has determined whether Ky. Rev. Stat. Ann. § 288.991 applies in the unique situation in this case, where Petitioners seek to apply retroactively a court decision invalidating the administrative grant of a license to Respondents, thereby seeking to void presumptively valid contracts entered into prior to that court's decision. These important questions should be resolved and decided by the lower courts rather than this Court addressing the certiorari issue advanced by Petitioners. The resolution of these and related questions could well moot or resolve the issue presented in Petitioners' petition for writ of certiorari.

In addition, many of the state regulatory and legislative issues that gave rise to the underlying lawsuit have been and may continue to be the subject of subsequent legislative attention from the Kentucky General Assembly. Prior to the filing of this litigation, the Kentucky General Assembly amended the Kentucky check cashing statute to explicitly include deferred deposit transactions. These amendments became effective on April 14, 1998, removing any doubt as to the legality of deferred deposit transactions in Kentucky. Accordingly, only a limited number of potential claimants who executed check cashing agreements before the amendments made by the Kentucky legislature are potentially affected by the instant lawsuit. Moreover, due to the legislative changes and clarifications made by the Kentucky legislature, the dispute at the core of this case involves an esoteric and technical issue involving state financial licensing law that is highly unlikely to ever require judicial attention again.

Therefore, this case does not involve sufficient importance, permanence or future application to warrant the issuance of a writ of certiorari.

V. Other Procedural and Standing Issues Make this Case Inappropriate for Certiorari.

Petitioners have sought a writ of certiorari from the Sixth Circuit's decision while issues regarding the arbitrability of the underlying dispute remain to be decided by the district court. While Respondents are confident that Petitioners' arguments ultimately will be rejected by the district court, the Sixth Circuit's remand for additional proceedings creates uncertainty about whether the issues in the current petition will be mooted or avoided by subsequent trial court proceedings. Due to the current procedural posture of the case then, the petition should be denied.

In its decision below, the Sixth Circuit recognized that Petitioners had raised "several alternative grounds on which the arbitration agreements should be found unenforceable." Pet. App. at 14. Specifically, Petitioners argued that arbitration here would "impose burdensome costs, deny statutory rights, and constitute an uninformed waiver of jury trial rights." *Id.* The court recognized that these arguments attacking the enforceability of the arbitration clause itself, while going "against strong precedent," must be determined by the court rather than an arbitrator. *Id.* at 15. Because the district court had not addressed these alternative grounds when deciding the original motion, the court remanded these allegations for further proceedings to determine whether they could be

proved as "grounds as exist at law or equity for the revocation of any contract." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 683 (1996). It would be imprudent for this Court to accept certiorari in this matter while those matters remain pending and subject to determination and later appellate review in the ordinary course of the case.

Furthermore, all but one of the ostensible Petitioners in this case lack standing to seek a writ of certiorari and assert the issue presented. Only two of the putative Petitioners signed arbitration agreements. *See* footnote 1, *supra*. The other individual Plaintiffs are free to pursue their claims in court and have no stake or interest in the arbitration issue. The Chapter 13 trustee, Beverly Burden, purporting to file this petition on behalf of the estates of various Plaintiffs, also has no standing. Of the two arbitration agreement signatories, Francine Jackman is not in Chapter 13 bankruptcy and Victoria Tevis' Chapter 13 bankruptcy has been converted to a Chapter 7 bankruptcy, where a different trustee represents the interests of her estate. Ms. Tevis' Chapter 7 bankruptcy trustee did not timely file a petition for writ of certiorari. Accordingly, this case does not involve a group of individuals with a unity of interest and legal standing to present and argue the claim at issue.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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